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2007 OCT 15 PM 4:55

CHIEF CLERKS OFFICE

October 15, 2007

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

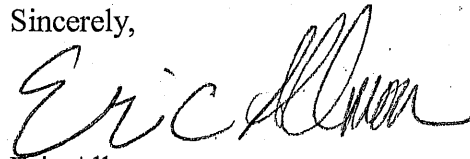
Re: In the matter of the Application of Lerin Hills, Ltd., for TPDES Permit No.
WQ0014712001, TCEQ Docket NO. 2007-1178-MWD.

Dear Ms. Castañuela,

Enclosed for filing please find an original and eleven copies of the Requestors'
Reply to Responses to their Hearing Request in the above-referenced matter.

If you have any questions please call.

Sincerely,



Eric Allmon
LOWERRE & FREDERICK

Enclosures

cc: Service List

TCEQ DOCKET NO. 2007-1178-MWD

2007 OCT 15 PM 4:55

APPLICATION OF LERIN HILLS §
LTD. FOR TPDES PERMIT NO. §
WQ001401712001 §

BEFORE THE
TEXAS COMMISSION CHIEF CLERKS OFFICE
ON ENVIRONMENTAL QUALITY

REPLY OF MOUNTAINVIEW AT TAPATIO, L.P., TAPATIO SPRINGS REAL ESTATE HOLDINGS, L.P., KENDALL COUNTY DEVELOPMENT CO., L.P., TAPATIO SPRINGS SERVICE COMPANY, AND KENDALL COUNTY UTILITY COMPANY TO RESPONSES TO THEIR HEARING REQUEST

COMES NOW, Mountainview at Tapatio, L.P., Tapatio Springs Real Estate Holdings, L.P., Kendall County Development Co., L.P., Tapatio Springs Service Company, and Kendall County Utility Company ("Tapatio" or "Requestors") and files this, its reply to responses to their hearing request.

I. SUMMARY

Tapatio generally agrees with the recommendations of the Office of Public Interest Counsel ("OPIC") with regard to persons and issues to be referred to SOAH. Specifically, Tapatio agrees with OPIC that the hearing requests of Mr. Rick Woods and Tapatio should be granted. Tapatio disagrees, however, with the position taken by the Executive Director ("ED") that none of the Tapatio entities qualify as affected persons under the Commission rules. Tapatio will address this issue below.

Both OPIC and the ED recommend that any hearing referred to SOAH should be for a duration of 9 months. Tapatio agrees that a nine month hearing is appropriate.

Finally, Tapatio agrees that the issues recommended for referral by OPIC and the ED should be referred to SOAH. Tapatio, however, disagrees with some recommendations of the ED on issues for referral. More specifically, Tapatio disagrees that issues listed by the ED as issue numbers 7 – 34 are not referable due to lack of relevance or some other reasons. Many of

these issues are relevant to the larger issues – which the ED and OPIC both agree should be referred to SOAH – including whether operation of the proposed facility will harm surface and groundwater supply and quality, will protect the health of humans, aquatic life, wildlife or livestock, and whether the proposed facility can comply with siting requirements.

II. TAPATIO TIMELY FILED COMMENTS AND A HEARING REQUEST

It should be clear that Tapatio timely filed comments and requested a contested case hearing in this matter on June 26, 2006, and October 23, 2006. Tapatio again filed comments and a hearing request, along with Mr. Rick Woods, on July 26, 2007. OPIC and the ED correctly note that a motion to for extension of time was filed on July 27, 2007, to extend the filing deadline by 15 minutes. As the motion explained, a technical problem with the fax machine at Lowerre & Frederick caused the hearing requests to be filed two (2) minutes after the July 26, 2007, 5:00 P.M. deadline. In the July 26 comments and hearing requests, Tapatio asserted that each of the issues addressed in the Executive Director's Response to Comments were relevant and material disputed issues of fact.¹ The Commission should exercise its authority to extend the deadline under 30 Tex. Admin. Code § 55.201(g)(2).² The Commission's decision on the motion for extension of time is controlling only as to the fate of Mr. Rick Woods' hearing request.

III. ANALYSIS

A. REPLY SPECIFIC TO THE RESPONSE OF LERIN HILLS

At the outset, it is worth replying to some of the arguments and misrepresentations³

¹ See Comments and Request for Contested Case Hearing on behalf of Tapatio, regarding proposed TPDES Permit No. WQ0014712001 for Lerin Hills Ltd., dated July 26, 2007, to LaDonna Castañuela, from Eric Allmon.

² "The Commission may extend the time allowed for the filing of a request for reconsideration or request for a contested case hearing." 30 Tex. Admin. Code § 55.201(g)(2).

³ There are several misrepresentations and misleading statements related to negotiations between Lerin Hills and Tapatio. These statements by Lerin Hills are inappropriate for public comment. Moreover, statements regarding such matters are relevant to the Commission's decision as to whether Tapatio qualifies as an 'affected person.'

contained in the response of Lerin Hills, Ltd. to hearing requests. From the filings before this Commission, it should be clear that Tapatio is concerned about the sufficiency, or lack thereof, of the applications by Lerin Hills to create both a Municipal Utility District ("MUD") and to obtain a wastewater discharge permit.⁴

It should also be clear that as opposed to the statements of Lerin Hills,⁵ the Tapatio real estate development is not in competition with Lerin Hills. Tapatio has a product different from that of Lerin Hills. That is, Tapatio is a custom homes developer. Lerin Hills on the other hand is selling to volume builders. Tapatio has no underlying competitive motive to delay the Lerin Hills project.

Tapatio is however, concerned about the consequences of the unjustified proliferation of wastewater treatment facilities in the area. As a service provider with facilities located within three miles of the proposed facility, Tapatio has an interest in ensuring that the regionalization of wastewater service is adequately considered during the permitting phase, so that it can be well-planned. Tapatio is concerned that if regionalization is not examined now, Tapatio may be left as the provider which TCEQ will look to in order to pick up the pieces when the separate system and treatment plant as proposed proves to be infeasible. The combined treatment of wastewater allows for more efficient operation and oversight of the facilities. Tapatio is also extremely concerned about the potential adverse impacts from the waste water discharge permit, now before this Commission, on the immediately neighboring development's water quality, supply,

⁴ Tapatio understands that the Commission will not consider issues related to the creation of the Lerin Hills MUD. Nevertheless, it is worth noting that Tapatio Springs Service Company has challenged TCEQ's approval of the MUD and a hearing is set on a Motion for Remand to Consider Material New Evidence in the matter of *Tapatio Springs Service Company, Lee Roy and Joan Hahnfeld and Edgar W. Blanch, Jr., v. Texas Commission on Environmental Quality* in the District Court of Travis County, Texas, 345th Judicial District, in Cause No. D-1-GN-06-004717

⁵ See, Lerin Hills Reply at item H.4.

and the health and safety the humans, aquatic life and wildlife therein.

B. TAPATIO IS AN "AFFECTED PERSON"

Applicable Law. Pursuant to Commission rules, an affected person is one who has a personal justiciable interest related to, among other things, an economic interest. See, 30 Tex. Admin. Code § 55.203(a). When the Commission seeks to make a determination as to whether such an interest exists, it is to consider several factors, including whether a reasonable relationship exists between the interest claimed and the activity regulated, as well as the likely impact of the regulated activity on use of the impacted natural resource by the person. See, 30 Tex. Admin. Code § 55.203(c).

It is undisputed that Mountainview at Tapatio, Tapatio Springs Real Estate Holdings and Kendall County Development Company are landowners adjacent to the Lerin Hills service area boundary. These Tapatio entities develop property adjacent to the Lerin Hills service area, for residential purposes. Each of these entities has an economic interest in the condition of that property and its natural resources that may be affected as a result of the Lerin Hills operations. Moreover, it is critical to the Tapatio developments that the natural resources, such as the groundwater here, underlying a karstic region, used by these developments are not in any way adversely impacted. The Tapatio system draws water from seven wells. Those wells are in close proximity to the proposed Lerin Hills discharge point. Tapatio is concerned about adverse impacts to the water in their wells due to the proposed TPDES authorization.

Finally, the Executive Director fails to recognize Tapatio's legally protected interests in regionalization. As noted, Tapatio is a provider of wastewater service with a wastewater treatment facility located within three miles, and so has an interest in whether, and how, service is regionalized in the area. Whether or not a CCN currently authorizes service is not

determinative of whether that CCN holder has a protected legal interest in regionalization. See, TEX. WATER CODE § 26.028.

The Kendall County Utility Company's⁶ CCN boundary runs alongside a significant portion of the Lerin Hills service area boundary. It is in a position, as a waste water service provider, that is unique from the general public – some of whom are service consumers. While the Executive Director is correct that the Kendall County Utility Company's CCN does not extend into the service area for Lerin Hills, its sewage treatment plant does possess excess capacity and is within a mere 3 miles of the proposed Lerin Hills plant.

C. ISSUES FOR REFERRAL

Tapatio disagrees with OPIC that only six issues should be referred to SOAH. OPIC's position, together with that of the Executive Director and the recommendations below, provide a more complete and proper referral to SOAH. A proper characterization of the issues for referral should be based on the issues raised in Tapatio's October 2006 and July 2007 comments (and hearing requests).

Tapatio disagrees with the Executive Director's position that issues listed by the ED as issue numbers 7 – 34 cannot or should not be referred to SOAH because they are not material, relevant or otherwise referable. As noted above, these issues are relevant to larger issues recommended by both the ED and OPIC, including whether operation of the proposed facility will harm surface and groundwater supply and quality, will protect the health of humans, aquatic life, wildlife or livestock, and whether the proposed facility can comply with siting requirements. The Commission should refer issues listed by the ED as numbers 1-14, 16-17, 19-21, 23-25, 27, 29, 31 and 34. Lerin Hills proposes its maximum discharge at times of rainfall when the quality

⁶ As previously noted, the Kendall County Utility Company and Tapatio Springs Services Company have an application pending at TCEQ that would allow the two entities to merge.

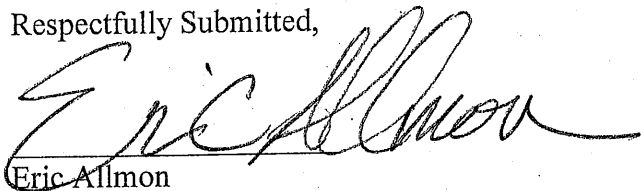
of the effluent will be the worst and the impacts will be significant.

It is worth noting that both OPIC and the ED recommend granting 6 issues. For the most part the ED's recommended issues 1-6 are practically equivalent to OPIC issues 1-6. Tapatio, however, supports adoption of the language recommended by OPIC and OPIC's inclusion of regionalization.⁷

IV. PRAYER

For the reasons stated above, Tapatio respectfully prays that the Commission grant the hearing requests of Tapatio and Mr. Rick Woods and refer the matter to SOAH for a hearing of 9 months and refer issues 1-14, 16-17, 19-21, 23-25, 27, 29, 31 and 34.

Respectfully Submitted,



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DEVELOPMENT CO., L.P., TAPATIO SPRINGS
SERVICE COMPANY, AND KENDALL
COUNTY UTILITY COMPANY

⁷ See Issue No. 3 recommended for referral by OPIC and Issue Nos. 12 and 19.

CERTIFICATE OF SERVICE

I, Eric Allmon, hereby certify that on October 15, 2007, the original and eleven (11) copies of the foregoing document was hand-delivered to the Chief Clerk at the Texas Commission of Environmental Quality, and copies were served on all parties listed below via hand delivery, facsimile transmission, or by deposit in the United States Mail.


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